No. 80-509

# Supreme Court of the United States

October Term, 1980

AMERICO MONGIELLO,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


ROBERT M. MORGENTHAU
*District Attorney*
New York County
*Attorney for Respondent*
155 Leonard Street
New York, New York 10013
(212) 553-9000

JERROLD L. NEUGARTEN
MARC FRAZIER SCHOLL
Assistant District Attorneys
*Of Counsel*

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### Preliminary Statement

On July 13, 1979, petitioner Americo Mongiello was convicted in the Supreme Court, New York County (ALEXANDER, J.), after a jury trial, of two counts of PERJURY IN THE FIRST DEGREE (New York Penal Law §210.15), two counts of OFFICIAL MISCONDUCT (New York Penal Law §195.00), and one count of HARASSMENT (New York Penal Law §240.25). On September 19, 1979, petitioner was sentenced

to concurrent indeterminate prison terms on his various offenses, the greatest of which was one and one-half to four and one-half years on the perjury convictions. By an order dated June 24, 1989, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. 76 A.D.2d 807. On July 30, 1980, leave to appeal to the New York Court of Appeals was denied. 50 N.Y.2d 1063.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division entered on June 24, 1980.

## Statement of the Case*

The evidence at trial established that petitioner, a New York City police officer, gave false testimony before the June 1978 Special Narcotics Grand Jury of the City of New York about an incident which took place on February 4, 1978. The evidence further established that during the February 4th incident, petitioner, using the butt of his gun, unlawfully struck a man on the head.

The People proved that during the early evening of February 4, 1978, several police officers, including petitioner, raided the ground floor hallway of a building in Manhattan, the location of a narcotics "shooting gallery." One of the civilians in the hallway, Lester Bryant, tossed a gun away when he heard the police enter (T. 336-337).** Petitioner, who had entered with his service revolver drawn, saw the

* Petitioner's "Statement of Facts" (Pet. A. 3) is nothing more than a restatement of the defense evidence at trial. This evidence was rejected by the jury.

** Page references preceded by "T." are to the trial minutes.

gun on the floor. As petitioner retrieved the gun, either that gun or his own service revolver fired (T. 111-112, 337). Petitioner was hit by a ricocheting bullet fragment. The fragment caused a minor neck injury (T. 493, 610-615, 623). The police then gathered all the civilians in the hallway and lined them up against the wall. The civilians were repeatedly asked who had owned the gun found by petitioner. The civilians were beaten, threatened, and thrown down a flight of stairs in an effort to determine the gun's owner. Lester Bryant, like several others, was hit over the head by petitioner with the butt of petitioner's service revolver. The police ultimately charged a man named Freddie Jones with shooting petitioner (T. 114-124, 131-137, 159, 223-231, 338-345, 349, 353, 432, 488-497, 561-578).

On May 31, 1978, a grand jury was empanelled to investigate the circumstances of petitioner's shooting. Approximately forty-six witnesses testified (T. 207-309). Petitioner, who waived immunity, testified before the grand jury that Jones had had a gun in his hand. He further testified that another police officer, Sergeant John Hooper, had tackled Jones, at which point Jones' gun "went off" (T. 272-288).

The defense presented testimony at trial in an effort to demonstrate that petitioner had not lied before the grand jury and that his version of Jones' firing the gun was correct (T. 800-808, 1245-1246, 1292, 1295).* The defense witnesses, including Sergeant Hooper, also testified that the police had simply used "necessary force" to control a violent and unruly mob (T. 811, 897, 1071-1074, 1261, 1312).

* The claim that Jones had the gun was contrary not only to Bryant's testimony, but also to three other witnesses, including Jones, who testified that Jones was nowhere near the location from which the shot was fired (T. 485, 557-558, 108-109).

Sergeant Hooper also testified as a character witness for petitioner, stating that petitioner had a good reputation for "non-aggressiveness" (T. 822-823). On cross-examination, the prosecutor inquired about Hooper's knowledge of petitioner's reputation. He asked if Hooper had heard that petitioner had wrongfully punched a man in April of 1975 (Pet. A. 15a). Hooper testified that he had no memory of such an incident (Pet. A. 16a-17a). The basis for the prosecutor's question was a civilian complaint filed against petitioner with the Police Department. When defense counsel objected to the question, the court held a sidebar conference and reviewed the complaint report offered by the prosecutor as the basis for his inquiries (T. 872-873). Defense counsel's objection to the question on the ground that the police administrative board which held a hearing on the complaint did not conclude that misconduct had occurred was overruled (Pet. A. 15a, 19a-24a).

At sentencing, the judge stated that the evidence demonstrated that petitioner had unjustly perjured himself. The judge further stated that petitioner's acts constituted a violation of the special trust placed in him by society. The judge indicated that the sentence imposed was necessary "in order to adequately punish this defendant for the violation [of] the trust the community placed [in] him by appointing him as one of its guardians, and to demonstrate to others who are guardians that higher standards of conduct and greater fealty to their oath is demanded" (Pet. A. 26a).

## ARGUMENT

**No substantial question is presented by petitioner's claim that his right to due process was violated by an evidentiary ruling permitting the prosecutor to impeach the basis of knowledge of a character witness or by petitioner's claim that he was denied equal protection on the ground that the sentencing court considered his position as a police officer in sentencing him. Moreover, as to this latter claim, certiorari should not be granted as the issue has been raised for the first time in his petition.**

### A. No substantial issue of federal due process arises out of New York's evidentiary rule permitting the prosecutor to impeach the knowledge of a defense character witness as to a defendant's reputation.

Petitioner claims that he was deprived of due process because the New York courts permitted the prosecutor to impeach the knowledge of a character witness for petitioner by inquiring if the witness had heard of an incident underlying a civilian complaint against petitioner which did not result in disciplinary action.

Petitioner raises no substantial federal question for this Court to review. Indeed, the claim raised by petitioner involves no federal question at all.

This Court, of course, has long refrained from interfering in the power of the states to develop evidentiary rules unless such rules violated the United States Constitution. As this Court stated in *Spencer* v. *Texas*:

> [i]t would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to

> promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution. 385 U.S. 554, 568-569 (1967).

Furthermore, the Court in *Spencer* recognized that evidentiary rules—even where the rules are prejudicial and the prejudice is inadequately vitiated by limiting instructions—rarely implicate the due process clause. 385 U.S. at 562, 564.

Other than his conclusory assertion, petitioner relies on nothing which even remotely supports his claim that any constitutional prohibition is implicated by New York's evidentiary rule. His principal case, *Michelson* v. *United States,* 335 U.S. 469 (1948), was expressly held in *Spencer* to involve only the supervisory power of this Court over the federal courts and did not lay down any constitutional rule. 385 U.S. at 563. The other cases relied upon by petitioner also involve nothing more than the rules of evidence to be applied in federal courts. Not one of the cases suggests that the rules applied in federal prosecutions are coextensive with the due process clause.* Indeed, this Court in *Michelson* noted that the Supreme Court was not the best forum to adjudicate evidentiary issues or develop rules of evidence. 335 U.S. at 485-486.

Moreover, even in its exercise of supervisory powers, through which the Court can exercise broader control over the federal courts than by merely enforcing provisions of

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* *Jackson* v. *Denno,* 378 U.S. 368 (1964), cited by petitioner, involves the determination of a confession's voluntariness, and, of course, has nothing whatsoever to do with the impeachment of character witnesses.

the Constitution, this Court, in *Michelson,* established principles which demonstrate that the question posed by the prosecutor here was plainly appropriate. Once petitioner put his reputation in issue, he threw "open the entire subject which the law has kept closed for his benefit" and the prosecutor was permitted "to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that [petitioner] is, but the name that he has which is put in issue." 335 U.S. at 479. The civilian complaint was something that Sergeant Hooper, himself a police officer and allegedly a close colleague of petitioner's, would likely have heard about if he were truly knowledgeable about petitioner's reputation. The complaint provided a sufficient good faith basis for the question even though the administrative hearing on it did not result in disciplinary action against petitioner. This is so since an arrest, a false arrest, or even an acquittal "may damage one's good name"; thus, if the character witness, as here, had not heard about the report the jury could well "doubt whether he is capable of giving any reliable conclusion as to [petitioner's] reputation." 335 U.S. at 483.

Finally, even if the question posed to the witness was somehow a violation of petitioner's constitutional rights, petitioner has made no effort to show how this single question on a matter collateral to guilt prejudiced him. Certainly, this single question, beyond all reasonable doubt, would not have influenced the verdict of the jury.

**B. The Court is without jurisdiction to review petitioner's claim that in sentencing him the judge violated his right to equal protection because he raises it for the first time in his petition. In addition, no substantial question is raised by the claim.**

Without citing a single authority, petitioner blithely asserts that he was denied equal protection when the judge stated at sentencing that "petitioner's punishment was to serve as an example to others." He contends that the judge "paid no heed to the fundamental constitutional requirements of individualized as contrasted to group punishment" (Pet. A. 9).

First, this claim was not raised in the state courts. On his appeal to the Appellate Division, petitioner objected to his sentence, but his argument, in its entirety, was:

> The predicate for this harsh sentence was based in part on the fact that the [petitioner], a public official, abused his trust. The sword should cut both ways. *See* [*People* v. *Tyler,* 46 N.Y.2d 251 (1978)].

Defense counsel, by his somewhat ambiguous claim before the state court, appears to have challenged the alleged harshness of petitioner's sentence for perjury. His claim—supported by a case having absolutely nothing to do either with sentencing or equal protection—certainly was not a challenge on the ground that there was a denial of equal protection. Since petitioner did not raise the claim presented now to the state courts, this Court lacks the jurisdiction to address it. *Tacon* v. *Arizona,* 410 U.S. 351 (1973); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

In addition, the claim raises no substantial question. The sentencing court found its perjury sentence, which was

less than the maximum permitted by New York law for petitioner's offense, necessary "to adequately punish [petitioner] for the violation" (Pet. A. 26a). Petitioner's offense was a serious one. Conduct such as petitioner's enforces the public's perception that some law enforcement officials act with flagrant disregard of the laws they are sworn to uphold. Underlying petitioner's conviction were acts of brutality, a cover-up of police misconduct, and an attempt to frame an innocent person for a serious offense.

Petitioner's theory that the court could not consider the deterrent effect of petitioner's sentence on other police officers is frivolous. Certainly, a sentencing court may consider the deterrence of criminal acts by others. *Williams* v. *New York,* 337 U.S. 241, 248 (1949). Surely, also, a concern about police officers who commit perjury in connection with the performance of their duties is not a concern based upon invidious discrimination. *Cf. Lehnhausen* v. *Lake Shore Auto Parts,* 410 U.S. 356 (1973). Such offenses perpetuate the public's view that law enforcement officials abuse their authority and act above the law. With equal certitude, even were one to require a "compelling state interest," it can hardly be maintained that the state does not have such an interest in the punishment of those who abuse special trusts placed in them and the prevention of such abuses by others.

## Conclusion

***The petition for a writ of certiorari should be denied.***

Respectfully submitted,

ROBERT M. MORGENTHAU
*District Attorney*
New York County

JERROLD L. NEUGARTEN
MARC FRAZIER SCHOLL
Assistant District Attorneys
*Of Counsel*

October, 1980